

FILED BY CLERK

MAY 13 2010

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,

Appellee,

v.

ADALBERTO MURGUIA-RODRIGUEZ,

Appellant.

)
)
) 2 CA-CR 2009-0253
) DEPARTMENT B
)

) MEMORANDUM DECISION
) Not for Publication
) Rule 111, Rules of
) the Supreme Court
)
)

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20084594

Honorable Deborah Bernini, Judge

VACATED

Terry Goddard, Arizona Attorney General
By Kent E. Cattani and Laura P. Chiasson

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B R A M M E R, Judge.

¶1 Adalberto Murguia-Rodriguez appeals from his conviction and sentence for trespass. He argues the trial court erred by instructing the jury that first-degree criminal trespass is a lesser-included offense of second-degree burglary. The state concedes the court erred and we agree. Therefore, we vacate the conviction and the sentence imposed.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to upholding Murguia-Rodriguez's conviction and sentence. *State v. Haight-Gyuro*, 218 Ariz. 356, ¶ 2, 186 P.3d 33, 34 (App. 2008). On November 18, 2008, M. called 911 after seeing Murguia-Rodriguez and another man trying to steal a truck parked in M.'s back yard. A Pima County Sheriff's deputy arrived and arrested both men after seeing them leave M.'s guest house.

¶3 A grand jury charged Murguia-Rodriguez with second-degree burglary of the guest house, attempted theft of a means of transportation, and third-degree burglary of the truck. Over Murguia-Rodriguez's objection, the trial court instructed the jury that first-degree criminal trespass is a lesser-included offense of second-degree burglary. After a three-day trial, the jury found Murguia-Rodriguez guilty of trespass but acquitted him of the other charges. The court suspended the imposition of sentence and placed Murguia-Rodriguez on three years' probation. This appeal followed.

Discussion

¶4 Murguia-Rodriguez asserts, and the state concedes, that the trial court erred in instructing the jury that criminal trespass is a lesser-included offense of second-degree

burglary. We review de novo whether one offense is a lesser-included offense of another. See *In re James P.*, 214 Ariz. 420, ¶ 12, 153 P.3d 1049, 1052 (App. 2007).

¶5 A crime is a lesser-included offense of another “(1) if the included offense, by its very nature, is always a constituent part of the major offense charged; or (2) if the terms of the charging document describe the lesser offense even though the lesser offense does not always make up a constituent part of the major offense charged.” *State v. Ennis*, 142 Ariz. 311, 314, 689 P.2d 570, 573 (App. 1984). The instruction here was not proper under the first test because criminal trespass contains an element that burglary does not—knowledge that one’s entry or presence is unlawful. *State v. Malloy*, 131 Ariz. 125, 130-31, 639 P.2d 315, 320-21 (1981); see also A.R.S. §§ 13-1504 (first-degree criminal trespass), 13-1507 (second-degree burglary). Therefore, it “is not necessarily a lesser included offense of burglary.” *Malloy*, 131 Ariz. at 131, 639 P.2d at 321; see also *State v. Kozan*, 146 Ariz. 427, 429, 706 P.2d 753, 755 (App. 1985) (change in statutory definition of “knowingly” did not affect reasoning in *Malloy*).¹

¶6 Nor was the instruction proper under the second test. The indictment alleged that Murguia-Rodriguez had “committed burglary in the second degree of a residential structure, belonging to or occupied by [M.].” It did not include an allegation

¹In explaining its decision to instruct the jury that trespass is a lesser-included offense of burglary, the trial court stated it “fe[lt] that the opinion in *Kozan* is mistaken.” But the court is “bound by our decisions” and was not permitted to disregard *Kozan*. *State v. Patterson*, 222 Ariz. 574, ¶ 20, 218 P.3d 1031, 1037 (App. 2009). The parties have not suggested, nor have we found, any basis to reconsider *Kozan*. See *White v. Greater Ariz. Bicycling Ass’n*, 216 Ariz. 133, ¶ 14, 163 P.3d 1083, 1087-88 (App. 2007) (appellate court will not disregard previous decision unless clearly erroneous).

that Murguia-Rodriguez knew his entry or presence was unlawful. *See Ennis*, 142 Ariz. at 314, 689 P.2d at 573 (criminal trespass not lesser-included offense of burglary under second test because charging document “d[id] not specifically include the element of knowingly entering or remaining unlawfully”). Because the lesser-included-offense instruction was improper, the trial court erred by giving it.

Disposition

¶7 For the reasons stated, we vacate Murguia-Rodriguez’s conviction and sentence for trespass.

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Judge

CONCURRING:

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Presiding Judge

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Judge